



Norfolk Southern Corporation  
Law Department  
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Office of Proceedings

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James R. Paschall  
Senior General Attorney



March 20, 2008

via fax (202) 245-0454 and DHL Express

Ms. Anne K. Quinlan, Acting Secretary  
Surface Transportation Board  
395 E Street S.W.  
Washington, DC 20024

221862

Re STB Finance Docket No. 35067, Norfolk Southern Railway Company -  
Trackage Rights Exemption - Commonwealth Railway Incorporated  
Submission of Final Versions of Trackage Rights Agreement

Dear Ms. Quinlan:

Attached via fax is a copy of the final redacted public version of the Trackage Rights Agreement previously submitted by Norfolk Southern Railway Company in the subject proceeding in draft form. In line with the submitted draft public version, the final public version also has commercially sensitive and confidential information redacted. The Board served a protective order applicable to the draft and final versions of the agreement in this proceeding on August 27, 2007.

Enclosed via DHL Express is an original and ten copies of the final redacted public version of the Trackage Rights Agreement previously submitted in draft form in the subject proceeding and, in a separate envelope, under seal pursuant to the protective order served August 27, 2007, is an original and ten copies of the entire highly confidential version of the Trackage Rights Agreement previously submitted under seal in draft form.

The final version of the Trackage Rights Agreement, which was the subject of the Board's notice of exemption served August 17, 2007 in this proceeding, was executed on Monday last week. NSR has not yet operated over the subject trackage under the Trackage Rights Agreement.

If you have any questions concerning this matter, please call me at the above number.

Ms Anne K Quinlan, Secretary  
STB Finance Docket No 35067  
March 20, 2008  
Page 2 of 2

Very truly yours,

  
James R Paschall

Enclosures

cc Eric M. Hocky, Esq  
Gollatz, Griffin & Ewing  
Four Penn Center  
Suite 200  
1600 John F. Kennedy Blvd.  
Philadelphia, PA 19103-2808

Virginia Department of Rail and Public Transportation  
P. O. Box 590  
Richmond, VA 23218-0590  
Attention: Kevin B Page, Director of Rail Transportation

**FINAL: COMMERCIALY SENSITIVE AND CONFIDENTIAL MATTER REDACTED**

**TRACKAGE RIGHTS AGREEMENT**

**THIS TRACKAGE RIGHTS AGREEMENT** (hereinafter referred to as "Agreement") made this 30 day of January, 2008, by and between **COMMONWEALTH RAILWAY INCORPORATED** a Virginia corporation (hereinafter referred to as "CWRV" or "Owner") and **NORFOLK SOUTHERN RAILWAY COMPANY** a Virginia corporation (hereinafter referred to as "NSR" or "USER"),

**WITNESSETH**

**WHEREAS**, NSR entered into a Lease Agreement dated August 23, 1989, whereby, among other things, NSR leased a portion of its West Norfolk Branch of railroad between Milepost F-4 00 at Churchland, City of Chesapeake, Virginia, and Milepost F-16 50 at Suffolk, Virginia (hereinafter referred to as "Leased Property") to CWRV for continued operation of rail services, and

**WHEREAS**, NSR also granted to CWRV, the exclusive option to purchase the Leased Property; and

**WHEREAS**, CWRV has exercised its exclusive option to purchase the Leased Property,

**WHEREAS**, CWRV is willing to allow NSR the right to use the Subject Trackage, as that term is defined below, on the terms and conditions hereinafter set forth, and

**WHEREAS**, CWRV is also granting CSX Transportation, Inc ("CSXT") equal access to use the Subject Trackage,

**NOW, THEREFORE**, the parties agree as follows.

**Section 1. GRANT OF TRACKAGE RIGHTS**

- (A) Subject to the terms and conditions herein provided, Owner hereby grants to User the right to operate its trains, locomotives, cars and equipment with its own crews, in its own account over the segment of Owner's railroad from Milepost F-9 90 near Churchland, VA and Milepost F-16 50 near Suffolk, VA, a distance of approximately 6 60 miles as illustrated on the map attached hereto, made a part hereof and marked Exhibit "I" (hereinafter referred to as the "Subject Trackage") The Subject Trackage shall be used for the purpose of accessing Owner's Marshalling Yard and related mainline trackage which are designated as "Interchange Tracks" in a separate Interchange Agreement of even date hereto between Owner and User

- (B) User's access to the Subject Trackage and the Marshalling Yard shall be equal to the access provided to any other carrier[s] connecting with Owner's line.

**Section 2. USE OF SUBJECT TRACKAGE**

- (A) User's use of the Subject Trackage shall be in common with Owner and any other user of the Subject Trackage, and Owner's right to use the Subject Trackage shall not be diminished by this Agreement. Owner shall retain the exclusive right to grant to other persons rights of any nature in the Subject Trackage, subject to the provisions of Section 1(B).
- (B) Except as may otherwise be provided by this Agreement or the aforementioned Interchange Agreement, User shall not use any part of the Subject Trackage for the purpose of switching, storage or servicing cars or equipment, or the making or breaking up of trains, except that nothing contained herein, upon prior approval of Owner, shall preclude the emergency use by User of such auxiliary tracks as may be designated by Owner for such purposes.
- (C) Owner shall have exclusive control of the management and operation of the Subject Trackage. [REDACTED] User shall not have any claim against Owner for liability account of loss or damage of any kind in the event the use of the Subject Trackage by User is interrupted or delayed at any time from any cause.
- (D) User may not grant rights of any nature on the Subject Trackage to other parties, or use the rights to haul traffic in the account of any other carrier.
- (E) User shall have the right to operate in either direction of the Subject Trackage.

**Section 3. RESTRICTION ON USE**

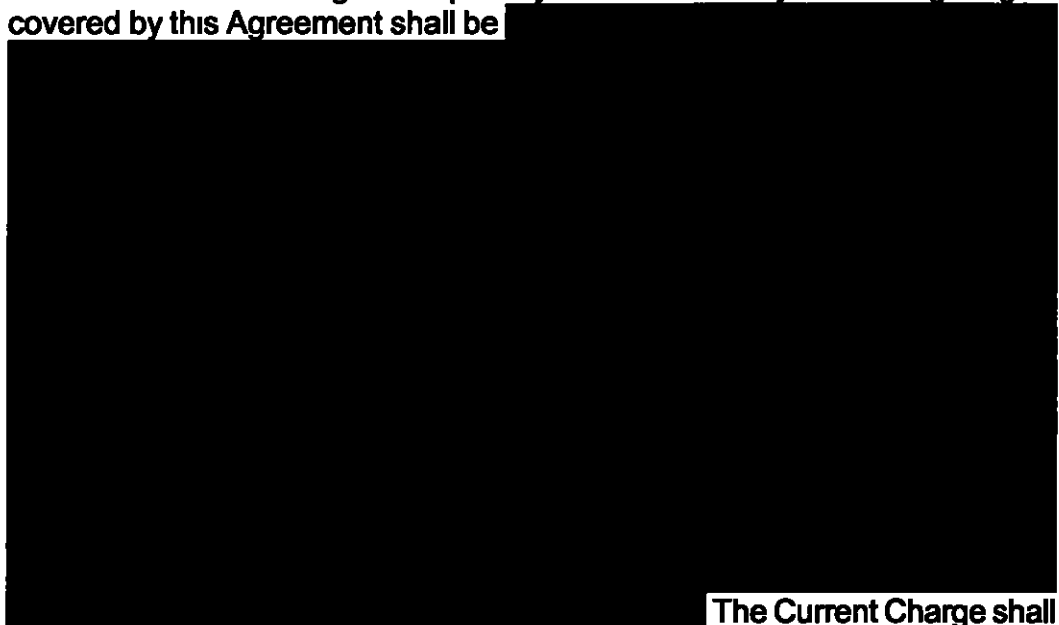
The Subject Trackage Rights herein granted are granted for the purpose of User using Subject Trackage to interchange railcars with Owner at, or in the vicinity of, Owner's Marshalling Yard in accordance with the aforementioned Interchange Agreement. Except as provided for in Section 1(B), User shall not perform any local freight service whatsoever at any point located on Subject Trackage. [REDACTED]

**Section 4    MISCELLANEOUS SPECIAL PROVISIONS**

- (A)    When operating over the Subject Trackage, User's locomotives and crews will be equipped to communicate with Owner on radio frequencies normally used by Owner in directing train movements (in accordance with Section 10[J]) on the Subject Trackage
- (B)    Procedures for qualification and occupancy of the Subject Trackage will be arranged by the local supervision of each carrier. All control and usage will be subject to the approval of Owner's representative or his designee.
- (C)    Before User enters upon the Subject Trackage with its trains, User must verify with Owner that User has the ability to make a complete and continuous, uninterrupted movement over the Subject Trackage and back onto User's own railroad

**Section 5.    COMPENSATION**

- (A)    The initial Current Charge to be paid by User for the Subject Trackage Rights covered by this Agreement shall be



The Current Charge shall be subject to change to reflect any increase or decrease subsequent to the Effective Date of this Agreement in labor, material and other costs, as more fully set forth below

- (B)    Owner shall issue a monthly invoice to User which shall include a statement which shall list the number of cars and the miles operated on the Subject Trackage, computed in accordance with this Section 5.
- (C)    The Current Charge set forth in Section 5 (A) hereof shall be revised

[REDACTED]

(D) In the event [REDACTED]

[REDACTED]

[REDACTED]

#### **Section 6. PAYMENT OF BILLS**

- (A) All payments called for under this Agreement shall be made [REDACTED]. No payments shall be withheld because of any dispute as to the correctness of items in the bills rendered, and any discrepancies reconciled between the parties hereto shall be adjusted in the accounts of a subsequent month. The records of each party hereto, insofar as they pertain to matters covered by this Agreement, shall be open at all reasonable times to inspection by the other party for a period of three (3) years from the date of the billing or other applicable activity.
- (B) Bills rendered pursuant to the provisions of this Agreement, other than those provided for in Section 5, shall include direct labor and material costs, together with the surcharges, overhead percentages and equipment rentals as specified by Owner at the time any work is performed by Owner for User or shall include actual costs and expenses, upon mutual agreement of the parties.

#### **Section 7. MAINTENANCE OF SUBJECT TRACK**

- (A) Owner shall maintain, repair and renew the Subject Trackage with its own

supervision and labor. Owner shall keep and maintain the Subject Trackage in reasonably good condition for the use contemplated, but Owner does not guarantee the condition of the Subject Trackage or that operations thereover will not be interrupted. Owner will keep the Subject Trackage, including applicable structures, [REDACTED]

[REDACTED]. Owner will maintain a vertical clearance of at least twenty-three feet (23') above top-of-rail throughout the Subject Trackage. Owner shall take reasonable steps to ensure that any interruptions will be kept to a minimum and shall use reasonable efforts to avoid such interruptions. User shall not by reason of failure or neglect on the part of Owner to maintain, repair or renew the Subject Trackage have or make any claim or demand against Owner or its parent corporation, subsidiaries or affiliates, or their respective directors, officers, agents or employees for any injury to or death of any person or persons whomsoever, or for any damage to or loss or destruction of any property whatsoever, or for any damages of any nature suffered by User resulting from any such failure or neglect.

- (B) Owner shall perform, at the sole expense of User and within a time period that is acceptable to User, such additional maintenance as User may reasonably require or request on the Subject Trackage and/or Subject Local-Access Trackage.

#### **Section 8. CONSTRUCTION AND MAINTENANCE OF CONNECTIONS**

- (A) Existing or proposed connections or facilities, which are jointly used by the parties hereto or other carrier(s) under existing or proposed agreements, shall be maintained, repaired and renewed by and at the expense of the party or parties responsible for such maintenance, repair and renewal under such agreements.
- (B) If, in the opinion of User, a new or upgraded connection is required at a point of permitted entry or exit other than the endpoints (other than such connection[s] being handled between Owner and any other carrier[s]), or, if in the opinion of User, other upgrading, including but not limited to switches, power switches, signals, communications, etc., is required for operational efficiency, then Owner will, subject to its own operational needs, cooperate and User will be responsible for funding that construction/upgrading applicable to User at actual cost or a cost mutually agreed to by Owner and User. Such construction/upgrading shall be progressed as follows:
  - (i) User or others shall furnish all labor and materials and shall construct such portions of the tracks located on the right-of-way of User or others, which connect the respective lines of the parties hereto and/or other carrier(s).

(ii) Owner shall furnish all labor and material and shall construct such portions of the tracks located on the right-of-way of Owner, which connect the respective lines of the parties hereto and/or other carrier(s). Upon termination of this Agreement, Owner may at its option remove any portion of the Subject Trackage and appurtenances located on Owner's right-of-way, constructed as a result of this Article, at the sole cost and expense of User. The salvage material removed shall be released to User or, as otherwise agreed upon, Owner will credit User the current fair market value for said salvage.

(iii) Owner will maintain, repair and renew the constructed/upgraded portions of the tracks located on the right of way operated by Owner which connect the respective lines of the parties hereto at the sole cost and expense of User and/or other carrier(s).

#### **Section 9. ADDITIONS, RETIREMENTS AND ALTERATIONS**

- (A) Owner, from time to time and at its sole cost and expense, may make changes in, additions and betterment to, or retirements from, the Subject Trackage as shall, in its judgment, be necessary or desirable for the economical or safe operation thereof or as shall be required by any law, rule, regulation, or ordinance promulgated by any governmental body having jurisdiction. Such additions and betterments shall become a part of the Subject Trackage and such retirements shall be excluded from the Subject Trackage.
- (B) If the parties agree that changes in or additions and betterment to the Subject Trackage, including changes in communication or signal facilities, are required to accommodate the operations of User and/or other carrier(s) beyond that required by Owner to accommodate its operations, Owner shall construct the additional or altered facilities and User and/or other carrier(s) shall pay to Owner the cost thereof, including the annual expense of maintaining, repairing and renewing such additional or altered facilities.

#### **Section 10. MANAGEMENT AND OPERATIONS**

- (A) User shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and any other federal and state and local laws, regulations and rules respecting the operation, condition, inspection and safety of its trains, locomotives, cars and equipment while such trains, locomotives, cars, and equipment are being operated over the Subject Trackage. User shall indemnify, protect, defend, and save harmless Owner and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents and employees.



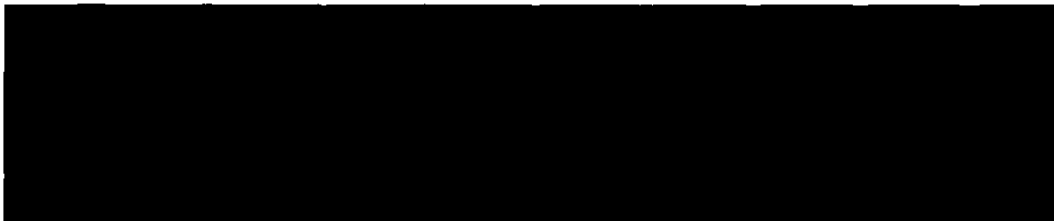
from and against all fines, penalties and liabilities (including reasonable attorneys fees and expenses and court and litigation costs) ("Costs") imposed upon Owner or its parent corporation, subsidiaries or affiliates, or their respective directors, officers, agents and employees under such laws, rules, and regulations by any public authority or court having jurisdiction in the premises, to the extent such Costs are attributable to the failure of User to comply with its obligations in this regard.

- (B) User in its use of the Subject Trackage shall comply in all respects with the safety rules, operating rules and other regulations of Owner, and the movement of User's trains, locomotives, cars, and equipment over the Subject Trackage shall at all times be subject to the orders of the transportation officers of Owner. User's trains shall not include locomotives, cars or equipment which exceed the width, height, weight or other restrictions or capacities of the Subject Trackage as published in Railway Line Clearances or as contained herein, and no train shall contain locomotives, cars or equipment which require speed restrictions or other movement restrictions below the maximum authorized freight speeds as provided by Owner's operating rules and regulations or contained herein without the prior consent of Owner.
- (C) User shall make such arrangements with Owner as may be required to have all of its employees who shall operate its trains, locomotives, cars and equipment over the Subject Trackage qualified for operation thereover, and User shall pay to Owner, upon receipt of bills therefor, any cost incurred by Owner in connection with the qualification of such employees of User, as well as the cost of pilots furnished by Owner, until such time as such employees are deemed by the appropriate examining officer of Owner to be properly qualified for operation as herein contemplated
- (D) If any employee of User shall neglect, refuse or fail to abide by Owner's rules, instructions and restrictions governing the operation on or along Owner's property, such employee shall, upon written request of Owner, be prohibited by Owner from working on Owner's property. If any party (CWRY, for itself and, for the purpose of this Agreement, any other carner[s]) shall deem it necessary to hold a formal investigation to establish such neglect, refusal or failure on the part of any employee of User, then upon such notice presented in writing, User shall promptly hold an investigation in which all parties concerned shall participate and bear the expense for its officers, counsel, witnesses and employees. Notice of such investigations to User's employees shall be given by User's officers, and such investigation shall be conducted in accordance with the terms and conditions of schedule agreements between User and its employees. [REDACTED] upon written request by Owner, be withdrawn by User from service on Owner's property, and User shall release and indemnify Owner from and against any and all claims and

expenses because of such withdrawal

- (E) Owner shall have the right to exclude from the Subject Trackage any employee of User determined by the above, to be in violation of Owner's rules, regulations, orders, practices, or instructions issued by Owner's Timetable or otherwise. User shall release, indemnify, defend, and save harmless Owner and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents and employees from and against any and all claims and expenses resulting from such exclusion.
- (F) The trains, locomotives, cars and equipment of User, Owner, and any other present or future user of the Subject Trackage or any portion thereof, shall be operated without prejudice or partiality to any party and in such manner as will afford the most economical and efficient movement of all traffic.
- (G) In the event that a train of User shall be forced to stop on the Subject Trackage, due to mechanical failure of User's equipment, or any other cause not resulting from an accident or derailment, and such train is unable to proceed, or if a train of User fails to maintain the speed required by Owner on the Subject Trackage, or if in emergencies, crippled or otherwise defective cars are set out of User's trains on the Subject Trackage, Owner shall have the option to furnish motive power or such other assistance as may be necessary to haul, help or push such trains, locomotives or cars, or to properly move the disabled equipment off the Subject Trackage, and User shall reimburse Owner for the cost of rendering any such assistance.
- (H) If it becomes necessary to make repairs to or adjust or transfer the lading of such crippled or defective cars in order to move them off the Subject Trackage, such work shall be done by Owner or its agents or contractors (unless the local operating officers agree for User to perform such work), and User shall reimburse Owner for the cost thereof.
- (I) In the event Owner and User agree that Owner should retain employees or provide additional employees for the sole benefit of User, the parties hereto shall enter into a separate agreement under which User shall bear all cost and expense for any such retained or additional employees provided, including without limitation all cost and expense associated with labor protective payments which are made by Owner and which would not have been incurred had the retained or additional employees not been provided.

(J)



[REDACTED]

**Section 11. MILEAGE AND CAR HIRE**

All mileage and car hire charges accruing on cars in User's trains on the Subject Trackage shall be assumed by User and reported and paid by it directly to the owner of such cars

**Section 12. CLEARING OF WRECKS**

Whenever User's use of the Subject Trackage requires rerailing, wrecking service or wrecking train service, Owner or its agent or contractor (unless the local operating officers agree for User to perform such work) shall perform or provide such service, including the repair and restoration of roadbed, track and structures. The cost, liability and expense of the foregoing, including without limitation loss of, damage to, or destruction of any property whatsoever and injury to and death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting therefrom, shall be apportioned in accordance with the provisions of Section 13 hereof All locomotives, cars, and equipment and salvage from the same so picked up and removed which is owned by or under the management and control of or used by User at the time of such wreck, shall be promptly delivered to it

**Section 13. LIABILITY**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Section 14. INVESTIGATION**

- (A) Except as provided in Subsection (B) hereof, all claims, injuries, deaths, property damages, and losses arising out of or connected with this Agreement shall be investigated, adjusted, and defended by the party bearing the liability, cost, and expense therefor under the provisions of Section 13 of this Agreement.

[REDACTED]

- [REDACTED]
- (C) In the event a claim or suit is asserted against CWRV or NSR which is the other's duty hereunder to investigate, adjust, or defend, then, unless otherwise agreed, such other party shall, upon request, take over the investigation, adjustment, and defense of such claim or suit.
- (D) All costs and expenses in connection with the investigation, adjustment, and defense of any claim or suit under Section 13 of this Agreement shall be included as costs and expenses in applying the liability provisions set forth in Section 13 of this Agreement, except that salaries or wages of full-time claim agents, full-time attorneys, and other full-time employees of either party engaged directly or indirectly in such work shall be borne by such party. Notwithstanding the foregoing, all costs and expenses in connection with the investigation, adjustment, and defense of any claim or suit covered by Section 13(K) of this Agreement shall be apportioned and/or borne in accordance with the AAR Rules and Procedures. In the absence of any governing AAR Rules and Procedures (and the provisions of AAR Freight Claims Article shall be the final arbitrator of whether any AAR Rules and Procedures govern), such costs and expenses in connection with the investigation, adjustment, and defense of such claims or suits shall be apportioned as liability for other loss, damage or destruction is otherwise apportioned under Section 13 of this Agreement.
- (E) Excluding Cargo Related Claim Liability claims govern by Sections 13(K) and 14(B), neither party shall settle or compromise any claim, demand, suit, or cause of action for which the other party has any liability under this Agreement without the concurrence of such other party if the consideration for such settlement or compromise exceeds [REDACTED]
- (F) It is understood that nothing in this Section 14 shall modify or waive the conditions, obligations, assumptions, or apportionments provided in Section 13 hereof.

## **Section 15. CLAIMS**

- (A) The parties shall agree between themselves on the most fair, practical and efficient arrangements for handling and administering freight loss and damage claims with the intent that (i) each party shall be responsible for losses occurring to lading in its possession for the account of such party and (ii) the parties shall follow relevant AAR rules and formulas in providing for the allocation of losses which are either of undetermined origin or in cars handled in interline service by or for the account of the parties.

- (B) Each party shall indemnify and hold harmless the other parties against any and all costs and payments, including benefits, allowances, and arbitration, administrative and litigation expenses, arising out of claims or grievances made by or on behalf of or lawsuits brought by or on behalf of its own employees or their collective bargaining representatives, either pursuant to employee protective conditions imposed by a governmental agency upon the agency's approval or exemption of this Agreement and operations hereunder or pursuant to a collective bargaining agreement. It is the parties' intention that each party shall bear the full costs of protection of its own employees under employee protective conditions that may be imposed, and of grievances filed by its own employees arising under its collective bargaining agreements with its employees.

#### **Section 16. TERM, DEFAULT AND TERMINATION**

- (A) This Agreement shall become effective (hereinafter referred to as "Commencement Date") as of the first date signed by both Owner and User, and if required, following receipt of any regulatory approvals to be obtained by NSR under Section 17, and following the expiration of any time periods required by the issuance of labor notices by Owner and/or User, and shall remain in full force and effect for a period of ninety-nine (99) years. User shall have the option, of extending this Agreement for additional terms of 99 years by notice in writing given at least (6) months prior to the end of the current term. The provisions of Section 1(B) shall become effective as provided for in that Section.
- (B) Termination of this Agreement shall not relieve or release either party hereto from any obligations assumed or from any liability which may have arisen or been incurred by such party under the terms of this Agreement prior to termination thereof.
- (C) In the event of any substantial failure on the part of User to perform its obligations provided under the terms of this Trackage Rights Agreement and its continuance in such default for a period of sixty (60) days after written notice thereof by certified mail from Owner, Owner shall have the right at its option, after first giving thirty (30) days written notice thereof by certified mail, and notwithstanding any waiver by Owner of any prior breach thereof, to terminate the Agreement. The exercise of such right by Owner shall not impair its rights under this Agreement or any cause or causes of action it may have against User for the recovery of damages.
- (D) The rights, benefits, duties and obligations running from or to User under this Agreement shall in all events expire (except liabilities incurred prior to termination) upon termination of this Agreement.



- (E) In the event that the conveyance of the Leased Property from NSR to CWRV is not completed for any reason, this Agreement will still become effective as provided for in Section 16(A)

#### **Section 17. REGULATORY APPROVAL**

The parties agree that this Agreement, or portions of this Agreement, will be submitted at NSR's sole expense, to the STB for approval CWRV agrees to support NSR's submission(s) to the STB User shall provide a draft of any filing to CWRV for its review prior to filing

#### **Section 18. ABANDONMENT OF SUBJECT TRACKAGE**

- (A) Owner shall have the right, subject to securing any necessary regulatory approval, to abandon the Subject Trackage. Before filing an application for regulatory approval of such abandonment, Owner shall give User ninety (90) days' advance notice in writing of its intention to do so in order that User may determine whether it desires to purchase the Subject Trackage
- (B) If User desires to purchase the Subject Trackage, it shall submit an offer of financial assistance under 49 U.S.C. Section 10904. Thereafter, the rights and obligations of the parties in respect to User's acquisition of the Subject Trackage shall be governed by applicable provisions of the law.
- (C) In any one of the circumstances listed below, User shall be deemed to have determined that it does not desire to purchase the Subject Trackage and that it desires to discontinue its use thereof:
- (i) User fails to submit an offer of financial assistance to purchase the Subject Trackage within the time prescribed by statute and applicable regulations, or
  - (ii) User, having made an offer of financial assistance to purchase the Subject Trackage, but being unable to reach agreement with Owner as to the sale price, fails within the statutory period to request the proper regulatory authority to establish the terms and conditions of the sale, or
  - (iii) User, having requested the proper regulatory authority to establish the terms and conditions of sale, withdraws its offer of financial assistance, or
  - (iv) User, having requested the proper regulatory authority to establish the terms of the sale, rejects the authority's order establishing said terms or fails to accept said terms within the time prescribed by said order

In such event User shall promptly file an application with the proper regulatory authority seeking approval of the discontinuance of its operations over the Subject Trackage. If User does not file an application seeking approval of the discontinuance of User's operations over the Subject Trackage within ninety (90) days, Owner shall be deemed to have been given User's power of attorney to take such action on User's behalf.

- (D) In the event any application filed by Owner is granted but an application filed by User under Sub-section (C) above is denied by the proper regulatory authority, the parties shall cooperate in taking such action as is reasonably necessary to effect a sale of the Subject Trackage to User (including securing any necessary regulatory authority) for a price consistent with the principles of 49 U.S.C. Section 10904.
- (E) In the event Owner abandons the Subject Trackage (or portion thereof) under circumstances which (because of changes in the law or otherwise) are not susceptible of handling under the procedures outlined above, the parties shall cooperate and take such action as is necessary to assure that User either promptly terminates its operations over the segment to be abandoned or purchases said segment at a price consistent with the principles of 49 U.S.C. Section 10904 as interpreted on the date of this Agreement.
- (F) In the event Owner's application for authority to abandon is denied, Owner and/or User will withdraw any application(s) it (they) has (have) filed under Sub-section (C) above.
- (G) Except as otherwise expressly agreed in writing, in the event any actions taken by the parties under this Article 18 result in an obligation imposed by any competent authority on any party hereto to protect the interests of affected employees, the responsibility for bearing the cost thereof shall be borne by the party [REDACTED] which is the employer of the affected employee or employees, notwithstanding the manner in which said cost may be apportioned in any order or decision imposing the protection.

#### **Section 19. ARBITRATION**

- (A) Any irreconcilable dispute arising between the parties hereto with respect to any of the provisions of this Agreement, except for those provisions relating to equal access of NS to CWRV, which cannot be settled by the parties themselves shall be settled through binding arbitration by a sole, disinterested arbitrator knowledgeable in railroad matters to be selected jointly by the parties in accordance with the rules of the International Institute for Conflict Prevention & Resolution ("CPR"). With respect to provisions of this Agreement relating to equal access of NS to CWRV, if such a dispute

cannot be settled by the parties themselves, the matter shall be settled through binding arbitration under the Fast Track Arbitration Rules of CPR, as modified by the parties as shown in Exhibit 2. In either arbitration situation, the arbiter shall not have the power to award consequential or punitive damages or to determine violations of criminal laws or antitrust laws. The decision of the arbitrator shall be final and conclusive upon the parties hereto, and shall be enforceable in a court of competent jurisdiction. Each party to the arbitration shall pay the compensations, costs, fees and expenses of its own witnesses, exhibits and counsel. The compensation, costs and expenses of the arbitrator, if any, shall be borne equally by the parties hereto.

- (B) Pending the award of the arbiter, there shall be no interruption in the transaction of business under this Agreement, and all payments in respect thereto shall be made in the same manner as prior to the arising of the dispute until the matter in dispute shall have been fully determined by arbitration, and thereupon such payment or restitution shall be made as required by the decision or award of the arbitrator.
- (C) All proceedings, testimony, submissions of the parties and award of the arbitrator shall be private and confidential between the parties and shall not be disclosed to another party, except in connection with a judicial action to enforce, vacate or modify the arbitration award or as required by law, but under the strictest confidentiality agreements or protective order the party can obtain.

## **Section 20. SUCCESSORS AND ASSIGNS**

- (A) Except as provided herein, neither this Agreement (including the documents and instruments referred to herein) nor any of the rights, interests or obligations hereunder, shall be assigned by any party, including by operation of law, without the prior written consent of the other party(ies), except to a controlled subsidiary, in the case of CWRY, a controlled subsidiary of its parent company.
- (B) Any party without the consent of the other parties may assign all of its rights and obligations under this Agreement only to any successor in the event of a merger, consolidation, sale of all or substantially all its assets, if such assignee executes and delivers to the other party(ies) hereto an agreement reasonably satisfactory in form and substance to such other party(ies) under which such assignee, which is reasonably satisfactory to the other party(ies), assumes and agrees to perform and discharge all the obligations and liabilities of the assigning party; provided that any such assignment shall not relieve the assigning party from the performance and discharge of such obligations and liabilities.

## **Section 21. NOTICE**

Any notice required or permitted to be given by one party to another under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the parties may agree, and shall be addressed as follows:

If to User: Vice President, Transportation Operations, and  
Vice President, Strategic Planning  
NORFOLK SOUTHERN RAILWAY COMPANY  
Three Commercial Place  
Norfolk, VA 23510-2191

If to Owner: President  
COMMONWEALTH RAILWAY INCORPORATED  
4337 Pablo Oaks Court  
Suite 200  
Jacksonville, FL 32224

with a copy to  
General Counsel  
Genesee & Wyoming Inc  
66 Field Point Road, 2<sup>nd</sup> floor  
Greenwich, CT 06830

Any party may provide changes in the above addresses to the other parties by personal service or U S. mail.

## **Section 22. FORCE MAJEURE**

Owner shall not be responsible to User and User shall not be responsible to Owner for delays or failure to perform under this Agreement if such delays or failure to perform are covered by circumstances beyond its control, including, but not limited to, Acts of God, floods, storms, earthquakes, hurricanes, tornadoes, or other severe weather or climatic conditions, acts of public enemy, war, blockade, insurrection, vandalism or sabotage, fire, accident, wreck, derailment, washout or explosion, strike, lockout or labor disputes experienced by the parties hereto, embargoes or AAR service orders, Federal Railroad Administration (FRA) orders, or governmental laws, orders or regulations

## **Section 23. CONFIDENTIALITY**

During the term of this Agreement and during the three (3) years after termination or expiration of this Agreement, the terms and provisions of this Agreement and all information to which access is provided hereunder will be kept confidential and will not be disclosed by either CWRV or NSR to any party except (i) as required by law or by rule, order or regulation of any court or regulatory agency with jurisdiction over the

subject matter to this Agreement, (ii) as may be necessary or appropriate for a party hereto to enforce its rights under this Agreement, (iii) to an independent consultant who agrees to be bound by the confidentiality terms hereof, if reasonably requested by the Commonwealth of Virginia or any other party entitled to equal access to the Subject Trackage to the extent required to establish that access is equal; (iv) to a parent, affiliate, subsidiary company or attorney and/or advisors of either party, (v) to an auditing firm retained by either party that has provided written assurance to abide by these confidentiality provisions

#### **Section 24. INDEMNITY COVERAGE**

As part of the consideration hereof, each party hereby agrees that each and all of its indemnity commitments in this Agreement in favor of the other parties shall also extend to and indemnify the parent corporation, subsidiaries, affiliates and partnerships of such other parties, and all of their respective directors, officers, agents, employees and partners

#### **Section 25. GENERAL PROVISIONS**

- (A) This Agreement and each and every provision hereof are for the exclusive benefit of the parties hereto and not for the benefit of any other party. Nothing herein contained shall be taken as creating or increasing any right of any other party to recover by way of damages or otherwise against any of the parties hereto.
- (B) This Agreement contains the entire understanding of the parties hereto and supersedes any and all oral understandings between the parties
- (C) No term or provision of this Agreement may be changed, waived, discharged or terminated except by an instrument in writing and signed by all parties to this Agreement.
- (D) All words, terms and phrases used in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.
- (E) All Article headings are inserted for convenience only and shall not affect any interpretation of this Agreement.
- (F) As used in this Agreement, whenever reference is made to the trains, locomotives, cars or equipment of, or in the account of, one of the parties hereto (CWRY, for itself and, for the purpose of this Agreement, any other carrier[s]), such expression means the trains, locomotives, cars and equipment in the possession of or operated by one of the parties (CWRY, for itself and, for the purpose of this Agreement, any other carrier[s]) and includes such trains, locomotives, cars and equipment which are owned by, leased to, or in the account of such party (CWRY, for itself and, for the

purpose of this Agreement, any other carrier[s]). Whenever such locomotives, cars or equipment are owned or leased by one party to this Agreement (CWRV, for itself and, for the purpose of this Agreement, any other carrier[s]) and are in the possession or account of another party to this Agreement (CWRV, for itself and, for the purpose of this Agreement, any other carrier[s]), such locomotives, cars and equipment shall be considered those of the other party under this Agreement (CWRV, for itself and, for the purpose of this Agreement, any other carrier[s]).

- (G) This Agreement is the result of mutual negotiations of the parties hereto; none of whom shall be considered the drafter for purposes of contract construction.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

WITNESS

COMMONWEALTH RAILWAY  
INCORPORATED

Ken R. McCluskey

By WMA. Jasper

Title President

WITNESS

NORFOLK SOUTHERN RAILWAY COMPANY

Mark M. [Signature]

By J.M. [Signature]

Title VP - Customer Service



**EXHIBIT 2**

**(Fast Track Arbitration Provisions)**

**[To be attached]**



11/15/07  
CWR

## **FAST TRACK MEDIATION AND ARBITRATION RULES OF PROCEDURE**

### **FAST TRACK MEDIATION RULES**

#### **1. Initiation of Mediation**

a. The Fast Track Mediation Rules may be adopted by agreement of the parties, with or without modification, before or after a dispute has arisen, either through a pre-dispute clause in a contract, or by entering into a dispute submission agreement.

#### **2. Mediator Appointment**

a. The mediator may be mutually selected by the parties or, in the event the parties cannot agree, appointed by CPR. At the request of either party, CPR will act expeditiously to appoint a mediator.

b. If the mediator determines that additional independent expertise is needed, the mediator shall make a recommendation to the parties for the selection of an independent expert to assist in the mediation.

#### **3. Mediation Locale**

a. The mutual agreement of the parties on the locale for mediation will control.

b. In absence of an agreement, the mediator shall determine the locale and the mediator's decision shall be final and binding.

#### **4. Initial Conferences**

a. No later than two business days after appointment, the mediator will contact the parties for the purpose of conducting a conference to establish the time and place for the mediation, required attendees, and the submission of additional materials to assist the mediation.

b. The mediator may confer directly with either party prior to the mediation so long as both parties are afforded an equal opportunity to be heard.

### **5. Mediation Initial Submissions**

**a. Each party's submission shall be divided into the following parts:**

**i. A non-confidential submission, which shall include a short statement of facts and issues to be resolved as separate agenda items with an identification of the stakeholders within the party's organization that control the resolution of each agenda item.**

**ii. A confidential submission, which, for each agenda item, shall state the party's goals. The confidential submission shall be provided to the mediator directly and not exchanged with the other side**

**b. Each party's submission shall identify on the first page of the submission what, if any, particular expertise is needed**

### **6. Mediation Session Submissions**

**Two days prior to the hearing each party may submit a short additional mediation statement.**

**Absent further direction from the mediator or agreement of the parties, the additional mediation statement shall have three parts:**

**a. First part: joint statement of prior efforts to resolve the dispute listing points of resolution, points of division and last offers, together with a statement if such offers are outstanding or withdrawn;**

**b. Second part: each party's short statement of position on every open agenda item;**

**c. Third part: a confidential submission to the mediator listing the economic costs and business issues for each party with respect to each agenda item, or any other information a party deems important for the arbitrator to know.**

### **7. Mediation Sessions**

**a. To the extent feasible, mediation will occur on consecutive days.**

**b. Sessions shall be confidential. Confidentiality shall cover all oral communications with or in the presence of the mediator and all written communications. The submission to mediation under these rules shall be deemed an agreement by each submitting party to treat the mediation session and all reasonably connected communications as settlement negotiations entitled to protection of Fed. R. Civ. P. 408 and any similar state rule. No statement may ever be used in any other proceeding for any purpose whatsoever except as the parties may jointly decide to waive confidentiality.**

c. The mediator's role shall be to facilitate resolution of agenda items and the mediator shall have no power to impose a resolution.

d. The mediator shall have complete discretion and control over each mediation session, including the time period for each session and suspension of any session.

### 8. Termination of Mediation

a. The mediation will be terminated if the parties achieve a resolution or, alternatively, if either the mediator or one of the parties determines that, in its view, the mediation is not productive.

b. If the dispute was not completely resolved, upon termination, the mediator may recommend alternative methods for resolving all or part of the dispute to the parties. Such methods may include:

- i. mediator arbitration of all or a part of the unresolved agenda items;
- ii. baseball arbitration of all or a part of the unresolved agenda items;
- iii. expert or other evaluation of all or a part of the unresolved agenda items;
- iv. non-binding arbitration;
- v. the investigation and development of additional data to assist the parties in resolving the dispute;
- vi. fast track arbitration; or
- vii. such other methods as the mediator deems appropriate in light of the nature of the parties' unresolved agenda items. Such recommendations may include separation of agenda items for purposes of mediation, arbitration or other dispute recommendation suggestions and ordering of the process by which each agenda item shall be resolved.

c. The mediator's recommendations shall be non-binding on the parties. With respect to any such recommendations, no party shall be required to respond directly to the mediator. The parties shall confer to determine if any such recommendation is acceptable and jointly inform the mediator of their decision. If the parties accept the mediator's recommendation and if the recommendation involves the sharing of information or positions developed during the mediation process, then the parties shall be deemed to waive confidentiality but only to the extent necessary to implement the recommendation.

d. Upon termination, at the request of the parties, the mediator may also recommend changes in the parties' present procedures for determining, isolating, addressing and resolving

potential areas of disagreement in the parties' ongoing contractual arrangements.

#### **MEDATION/ARBITRATION OPTION**

##### **1. Mediation/arbitration option**

At any point during the mediation, the parties may mutually consent to submit any matter or portion thereof to arbitration before the same neutral acting as the mediator. *If the parties so agree,* ~~The mediator shall~~ not be disqualified to serve as an arbitrator. By consenting to mediation/arbitration before the same neutral, the parties will be deemed to waive any objection to such a procedure and accept such a procedure as a tool to break impasses on critical agenda items that may assist in the resolution of the overall disagreements between the parties. Any such consent shall be in writing.

##### **2. Selection of Rules**

At the time of any such consent, the parties shall agree upon the rules that will govern the arbitration. The parties may agree upon any rules that they deem appropriate including use of some or all of the Fast Track Arbitration Rules set forth below, the Non-Administered Rules or any other Rules that are mutually agreeable. Such agreement shall be in writing and made a part of the consent. The parties may also permit the arbitrator to select the appropriate rules and procedure that will govern the arbitration.

##### **3. Congruent Tracks**

The parties may also select mediation/arbitration with different people serving as the mediator and the arbitrator.

#### **FAST TRACK ARBITRATION RULES**

1. The Rules of the International Institute for Conflict Prevention and Resolution for Non-Administered Arbitration ("Non-Administered Rules") shall apply to Fast Track Arbitration except as modified herein.

##### **2. Initiation of Arbitration and Notice of Defense**

- a. Arbitration shall be initiated pursuant to the Non-Administered Rules.
- b. The Respondent shall have ten days to serve its notice of defense to the claim.
- c. As part of any notice of claim or defense, a party shall provide:

- i. adequate notice of all claims or defenses as applicable;
  - ii. a separate section identifying the parties' relationship;
  - iii. a separate section identifying the significance of the dispute to that relationship;
  - iv. a separate section articulating the desired result or claim for relief;
  - v. a separate section listing names and addresses of all reasonably potential witnesses;
  - vi. a separate section identifying the location and the categories of all documents in the party's possession, custody or control that may be relevant to the dispute;
  - vii. a statement of any subject matter expertise the party believes is needed for a just resolution.
- d. Any notice required hereunder may be provided by email or fax.
- e. Any counterclaim shall be asserted with the notice of defense. The counterclaim and notice of defense to the counterclaim shall follow the procedures set forth above.

### 3. Selection of Arbitrator

- a. By selecting these rules of procedure, the parties are agreeing that one arbitrator shall hear and decide the dispute.
- b. No later than five days after the issues have been joined through service of the last due notice of defense, the parties shall exchange lists of proposed arbitrators. The parties shall at the same time serve on CPR all notices of claims and defenses together with proposed lists of arbitrators.
- c. No later than ten days after the issues have been joined, the parties will notify CPR whether they have resolved the selection of an arbitrator by mutual agreement. In the absence of mutual agreement, both parties will be deemed to have requested CPR to select the single arbitrator. CPR shall follow the procedures set forth in Rules 6.4 and 6.5 of the Non-Administered Rules and select the arbitrator to hear the dispute who shall be neutral and independent.
- d. The arbitrator shall commit to hold hearings and render an award within the time periods established by these Rules.

#### 4 Arbitration Locale

- a. The parties shall mutually agree on the locale for arbitration no later than five days after the issues have been joined through service of the last due notice of defense
- b. In absence of agreement, the arbitrator shall determine the appropriate locale as provided for in Rule 9 of the Non-Administered Rules and the arbitrator's decision shall be final and binding.

#### 5. Pre-hearing Conference

Within 5 business days of appointment, the arbitrator shall hold a pre-hearing conference as contemplated by Rule 9 of the Non-Administered Rules to address all issues set forth in Rule 9 and any other matter which the arbitrator or parties believe is relevant. The arbitrator may hold one or more conferences in the arbitrator's discretion.

#### 6 Limited Discovery

- a. Except as otherwise ordered by the arbitrator, discovery shall be limited to the exchange of documents.
- b. Upon date(s) established by the arbitrator, both parties will serve on the other:
  - i. all non-privileged hardcopy and electronic documents that they reasonably believe are relevant to any issue to be resolved in the arbitration;
  - ii. a privilege log with a sufficient description so that the assertion of privilege can be appropriately evaluated by the non-producing party and the arbitrator;
  - iii. in addition, each party may serve a list of particular categories of documents needed with respect to the dispute, which list shall attempt to be as specific as reasonably practicable, and each party shall then serve in response a statement of whether the initial production included the requested documents and, if not, whether the production will be supplemented or whether there is an objection thereto;
  - iv. any documents not produced two weeks prior to the arbitration hearing may not be used by the producing party at the hearing, except for rebuttal documents, which may be admitted in the discretion of the arbitrator;
  - v. all documents served will be subject to an appropriate protective order providing for confidentiality of the documents and limiting the use of the information contained therein to the arbitration and not any other commercial use.

#### 7. Neutral Expert

a. If the arbitrator deems it appropriate, the arbitrator may appoint an independent neutral expert to assist the arbitrator in gathering facts necessary to a full resolution by direct interviews with party representatives prior to the hearings

b. The neutral expert shall render his report in writing with copies to each party:

c. The cost for the neutral expert shall be shared by the parties.

#### 8 Hearings

a. Hearings may be held or witnesses presented by video conference or such other manner as the arbitrator deems appropriate.

b. The arbitrator may impose a timed hearing with equal time for either party to present its evidence. In any timed hearing, a party may present a witness on direct examination through an affidavit. The arbitrator may also limit the number of experts to be presented by the parties.

c. The arbitrator shall determine the appropriate procedures for the arbitration hearing in mind that the parties selected fast track arbitration to achieve a fast, equitable solution without the formalities required by judicial processes.

d. The parties shall produce such evidence as the arbitrator deems necessary to understand and to determine the matters in dispute. The arbitrator shall have the power to subpoena witness or documents upon request of either party or as deemed necessary by the arbitrator

e. Unless the parties have otherwise jointly consented, hearings will commence within sixty days of case commencement and will be closed within thirty days thereafter. The arbitrator will make every effort to schedule each side's presentation of evidence on consecutive days.

f. If the parties have related agenda items pending in mediation, at the request of either party, the mediator (if separate from the arbitrator) may attend any of the arbitration sessions.

#### 9. Award

a. The arbitrator may refer any portion of the dispute to mediation before rendering an award. Mediation will be conducted in accordance with CPR's fast track mediation procedures

b. The award will be rendered within fourteen days of the close of hearings.

c. The arbitrator will render a written reasoned award.

d. If the award is rendered before the expiration of the fourteen day period, CPR shall notify the parties two business days before publication of the award in order to afford the parties time to resolve any dispute directly.

10. Costs of the arbitration proceeding and the arbitrator  
All costs shall be borne equally by the parties, but the arbitrator may divide <sup>such</sup> costs as the arbitrator deems appropriate as part of the award.

Each party shall bear its own costs of participation in the arbitration, including costs of counsel and witnesses.